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## Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency

Robert C. Hannon

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# Returning to the True Goal of the Individuals with Disabilities Education Act: Self-Sufficiency

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## I. INTRODUCTION

This country has long recognized the necessity of an education in order to function productively in society. As suggested by one of the founding fathers, Thomas Jefferson, “some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system.”<sup>1</sup> More recently, the Supreme Court recognized the importance of education in *Brown v. Board of Education*:<sup>2</sup> “[I]t is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education.”<sup>3</sup> The Court reiterated its belief in *Plyler v. Doe*:<sup>4</sup> “[B]y depriving the children of any disfavored group of an education, we

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1. See *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting the proposition that education prepares individuals to be self-sufficient members of society).

2. 347 U.S. 483, 483 (1954).

3. *Id.* at 493.

4. 457 U.S. 202, 202 (1982).

foreclose the means by which that group might raise the level of esteem in which it is held by the majority . . . . Illiteracy is an enduring disability."<sup>5</sup>

Today this need to educate remains just as pressing. Our country is plagued by economic and social costs because of its failure to provide this "basic tool."<sup>6</sup> Without an education, adults are unable to provide for themselves financially, much less for their families.<sup>7</sup> As a result, many turn to crime.<sup>8</sup> Theft, drugs, and violence become the solution, and society is left the victim of the very problem it helped to create.<sup>9</sup>

This Note focuses on children with mental impairments<sup>10</sup> and the public school system's current attempts to meet their needs. Historically, despite the American judicial system's recognition of the importance of education,<sup>11</sup> children with disabilities were routinely denied the benefits of the free public education the Court required for children of all races in *Brown*.<sup>12</sup> This denial took two forms. The first

5. *Id.* at 222.

6. Anthony H. Mansfield, *Juvenile Justice Gone Awry: Expulsion Statutes Unjustly Deny Educational Rights to Students*, 1 N.Y. City L. Rev. 203, 220 (1996).

7. *Id.*

8. *Id.* at 218, 221.

9. *Id.*

10. Society can begin to recognize individuals with disabilities as unique human beings by not referring to them as the "retarded" or the "disabled." Congress made a major step toward this goal in 1990 when it changed the name of the legislation on which this Note focuses from the Education of the Handicapped Act to the Individuals with Disabilities Education Act. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 104-476, § 901(a), 104 Stat. 1103, 1141-42 (1990), codified at 20 U.S.C. § 1400(a) (1994 ed.).

11. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (noting the "important functions" of boards of education in "educating the young for citizenship" but striking down a West Virginia law requiring public school students to salute the American flag on first amendment grounds); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (recognizing that private primary schools in Oregon were regarded as "useful and meritorious"; recognizing that states may not force students to attend only public schools and that parents have a fundamental liberty interest in directing the education of their children); *Meyer v. State of Nebraska*, 262 U.S. 390, 400-01 (1923) (stating that education is "useful and honorable, essential, indeed, to the public welfare").

12. See *Brown*, 347 U.S. at 493 (describing the importance of equal public school education for all children). In the findings of the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., Congress noted that, as of 1975:

- (1) there are more than eight million children with disabilities in the United States today;
- (2) the special education needs of such children are not being fully met;
- (3) more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
- (4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

was outright exclusion of children with mental impairments from public schools,<sup>13</sup> and the second was more subtle, lying in the system's tendency to see only the impairment, not the unique individual.<sup>14</sup>

Children's advocates began responding to these injustices in the 1960s and early 1970s, relying on the strong language in *Brown* to argue that the Equal Protection Clause of the Fourteenth Amendment protects not only children of different races, but also children with disabilities: "Such an [educational] opportunity, where the state has undertaken to provide it, is a right which must be made available to *all* on equal terms."<sup>15</sup> The fruits of these advocates' labor were realized in two federal court cases in 1972.

In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* ("PARC"),<sup>16</sup> the court analyzed several Pennsylvania statutes that went beyond the subtle form of exclusion. The statutes permitted school directors to reject students who did not have the mental capacity of a typical five-year-old, and the laws permitted the State Board of Education to exclude "uneducable and untrainable" children from the public schools.<sup>17</sup> These statutes prevented some 70,000 to 80,000 children with mental impairments

(5) there are many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected; [and]

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 U.S.C. § 1400(b).

13. For example, a 1958 Illinois Supreme Court decision held that Illinois's compulsory education statute did not require the state to provide a free public education to children with mental impairments. See *Department of Pub. Welfare v. Haas*, 15 Ill. 2d 204, 154 N.E.2d 265, 270 (1958) (holding that, while the Illinois Constitution requires Illinois to provide public education, it does not require Illinois to provide public education to the "feeble minded or mentally deficient" who cannot "receive a good common school education"). See also *State ex rel. Beattie v. Board of Educ. of City of Antigo*, 169 Wis. 231, 172 N.W. 153, 154 (1919) (discussing the exclusion of "a crippled and defective child . . . since birth" due to the fact that he had "a depressing and nauseating effect upon the teachers and school children," which "distract[ed] the attention of other pupils, and interfere[d] generally with the discipline and progress of the school").

14. Senator Robert T. Stafford outlined this tendency: "[T]he more subtle and perhaps more destructive invisibility of being in fact 'seen,' but 'seen' by an inner eye that perceives a label rather than a unique person. An eye which does not see Johnny or Susie, but instead, sees 'crippled,' or 'retarded,' or 'maladjusted.'" Robert T. Stafford, *Education for the Handicapped: A Senator's Perspective*, 3 Vt. L. Rev. 71, 72 (1978).

15. *Brown*, 347 U.S. at 493 (emphasis added).

16. 343 F. Supp. 279 (E.D. Pa. 1972).

17. *Id.* at 282 nn.3-4.

from receiving a public education.<sup>18</sup> A group of parents of children labeled "mentally-retarded" brought a class action lawsuit challenging the legislation.<sup>19</sup> A three-judge panel noted that the statutes presented serious constitutional issues<sup>20</sup> concerning the children's due process<sup>21</sup> and equal protection rights.<sup>22</sup> In reaching this conclusion, the court took particular offense at the labeling of certain children as uneducable, noting "expert opinion" had indicated that "a mentally retarded person can benefit at any point in his life and development from a program of education."<sup>23</sup> The court recognized that the broad language in *Brown* extended beyond the race issue to include children with mental infirmities. *PARC* resulted in a consent agreement whereby mentally impaired children were guaranteed "access to a free public program of education and training appropriate to [their individual] capacities,"<sup>24</sup> with the training to take place in a regular classroom if possible.<sup>25</sup> Finally, a stipulation accompanying the consent agreement gave parents an active role in planning educational programs for children with disabilities. As a result of this stipulation, parents were entitled to mandatory notice of any changes in the child's education plan, an opportunity to appeal, and access to the child's records.<sup>26</sup>

That same year, in *Mills v. Board of Education of District of Columbia*,<sup>27</sup> another federal court went a step further by explicitly

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18. *Id.* at 296. The court noted that the children "were denied access to any public education services in schools, home or day care or other community facilities, or state residential institutions." *Id.* (emphasis omitted).

19. *Id.* at 281-82.

20. Since the parties agreed to enter into a final consent decree, the court did not reach conclusions on these issues, but it did state that the plaintiffs had presented colorable constitutional claims, which gave rise to federal subject matter jurisdiction. *Id.* at 295-97.

21. The court recognized that the possibility of misdiagnosis or placement in an overly restrictive environment, coupled with attendant stigmatization, gave rise to a "colorable claim" that the Due Process Clause required notice and a hearing before schools could label a child "mentally retarded." *Id.* at 293-95. In addition, the court noted that the denial of notice and a hearing for aggrieved parents of children excluded from school might violate the parents' procedural due process rights. *Id.* at 293.

22. *Id.* at 295-97. The court concluded that the plaintiffs established a "colorable claim" under the Equal Protection Clause, stating that "the evidence raises serious doubts . . . as to the existence of a rational basis" for denying educational benefits from the plaintiffs. *Id.* at 297.

23. *Id.* at 296 (quoting the consent agreement entered into by the parties).

24. *Id.* at 314.

25. "[P]lacement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training." *Id.* at 307. This philosophy has come to be known as mainstreaming and, as will be seen through later discussion, has become one of the most controversial issues in educating those with mental impairments. See Part III.B.2.b.

26. *PARC*, 343 F. Supp. at 303-05.

27. 348 F. Supp. 866, 866 (D.D.C. 1972).

holding that a statute similar to the one addressed in *PARC* was unconstitutional.<sup>28</sup> The statute challenged in *Mills* allowed the Board of Education to “excuse” a child from mandatory school attendance if the child was “unable mentally or physically to profit from attendance at school.”<sup>29</sup> The *Mills* court held that the District of Columbia statute governing education of children with mental impairments violated constitutional due process and equal protection rights.<sup>30</sup> In addition, the *Mills* court held that the cost of educating children with disabilities should not undermine its overriding importance.<sup>31</sup>

Both the *Mills* and *PARC* decisions were ostensibly based on due process and equal protection concerns, but both also relied on the *Brown* Court’s emphasis on the inherent importance of education.<sup>32</sup> The *Brown* language, as well as the *Mills* and *PARC* decisions, motivated Congress to enact the Education for All Handicapped Children Act (“EHA”) in 1975, renamed the Individuals With Disabilities Education Act (“IDEA”) in 1990.<sup>33</sup> Quoting *Brown*, the Senate Committee on Labor and Public Welfare stated that the Supreme Court had established the principle that an “[educational] opportunity . . . is a right which must be made available to all on equal terms.”<sup>34</sup> The Committee continued to emphasize the importance of educational opportunities, not only for disabled children, but also for society as a whole, in setting forth what should be viewed as the substantive goal of the IDEA. The committee explained:

[P]ublic agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to

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28. *Id.* at 875-77. The plaintiffs in *Mills* were seven children, represented by their next friends, with various disabilities, including mental impairments, behavioral and emotional disorders, and hyperactivity. *Id.* at 868.

29. *Id.* at 874 (quoting D.C. Code § 21-203 (1967)).

30. *Id.* at 875.

31. *Id.* at 876 (“[T]he District of Columbia’s interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources.”).

32. See *id.* at 874-75 (concluding that denying children with disabilities an equal, public education violated their due process rights and citing *Brown*, 347 U.S. at 493); *PARC*, 343 F. Supp. at 297 (finding “colorable claims” of due process and equal protection violations).

33. 20 U.S.C. § 1400 et seq.

34. Education for All Handicapped Children Act of 1975, S. Rep. No. 94-168, 94th Cong., 1st Sess. 6 (1975), reprinted in 1975 U.S.C.C.A.N. 1425, 1430 (quoting *Brown*, 347 U.S. at 493).

remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.<sup>35</sup>

The ninety-third Congress thus passed the IDEA with the intent to provide equality and self-sufficiency to children with disabilities.<sup>36</sup> The question this Note addresses is whether the courts have stayed true to this original intent, particularly as it pertains to children with mental impairments.

Although the IDEA includes many types of disabilities,<sup>37</sup> this Note focuses on two: "mental retardation" and "serious emotional disturbance." Part II outlines the technical definitions of these two types of disabilities and discusses their differences. It also explains the program the IDEA uses to provide for these two unique disabilities under one statutory heading. Part III gives a nondetailed explanation of the mechanics of the IDEA and the benefits it attempts to provide, focusing on the concept of Free Appropriate Public Education

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35. S. Rep. No. 94-168 at 9 (cited in note 34) (echoing the language from *Brown*, 347 U.S. at 493, with which this Note began). The *PARC* decision also emphasized the societal importance of educational opportunities for disabled children:

The President's Committee on Mental Retardation in its 1969 Annual Report . . . estimates that "[s]ome three-quarters of this nation's retarded people could become self-supporting if given the right kind of training early enough. Another 10 to 15 percent could become partially self-supporting." Dr. Aubrey J. Yates . . . states that "[t]wo-thirds and probably four-fifths of those who might on I.Q. [score] be classified as feeble minded can live in financial and social independence under present economic circumstances."

*PARC*, 343 F. Supp. at 296 n.50 (citations omitted) (quoting President's Committee on Mental Retardation, U.S. Department of Health, Education, and Welfare, *Annual Report of the President's Committee on Mental Retardation* 17 (U.S. G.P.O., 1969); Aubrey J. Yates, *Behavior Therapy* 339 (John Wiley & Sons, 1970)).

36. For a more detailed description of the history behind the IDEA, see Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DePaul L. Rev. 599, 608-18 (1995) (detailing, in addition to the legislative history of the IDEA, the history of de jure exclusion of children with disabilities, early legislation to aid disabled children, constitutional theories regarding rights of disabled children, and congressional recognition of the civil rights of the disabled through the Rehabilitation Act of 1973). See also Rebecca Weber Goldman, Comment, *A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act*, 20 U. Dayton L. Rev. 243, 246-53 (1994) (discussing judicial and legislative landmarks that led to the enactment of the IDEA). The Act itself implements essentially a "carrot and stick" approach to accomplishing its goals. In short, the statute "provides federal funds to assist state and local agencies in educating children with disabilities, but conditions such funding on compliance with certain goals and procedures." *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993).

37. The Act defines the term "children with disabilities" to mean "children . . . with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities . . . who, by reason thereof, need special education and related services." 20 U.S.C. § 1401(a)(1)(A).

("FAPE"). It seeks to define "appropriate education"<sup>38</sup> and "special education and related services,"<sup>39</sup> two benefits specifically required by the IDEA. Part IV explores the special topic of discipline under the IDEA, an issue that presents serious problems for all children with disabilities. This section briefly analyzes a recently proposed amendment to the statute addressing disciplinary concerns.

This Note concludes that the substantive goal of the IDEA should be to enable each child to become self-sufficient. Only by addressing the unique needs of children with disabilities will this goal of independence, the true purpose of an educational system, be met.

## II. THE IDEA AND CHILDREN WITH MENTAL IMPAIRMENTS: DEFINING DISABILITY AND SERVING INDIVIDUAL NEEDS

As explained above, this Note focuses on two of the disabilities listed in the IDEA: "mental retardation" and "serious emotional disturbance."<sup>40</sup> The Code of Federal Regulations defines "mental retardation" as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period that adversely affects a child's educational performance."<sup>41</sup> This combination of both low intellectual functioning and poor adaptive behavior indicates the severity of this disability.<sup>42</sup> As a result, a child suffering from mental retardation will often have drastically different educational goals from those of a child without such a severe disability. For example, a child with mental

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38. See Part III.A.

39. See Part III.B.

40. The Act recognizes three other mental disabilities. The first is "specific learning disability," described in the Code of Federal Regulations as "a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written." 34 C.F.R. § 300.7(b)(10) (1996). The term is limited to such conditions as "minimal brain disfunction" and "dyslexia." *Id.* Since the term does not apply to children suffering from "mental retardation" or "emotional disturbances," it will not be a focus here. See *id.* (specifically excluding these disabilities). The second is "traumatic brain injury," which refers to "an acquired injury to the brain caused by an external physical force." *Id.* § 300.7(b)(12). The third is autism, which is defined as "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age 3, that adversely affects a child's educational performance." *Id.* § 300.7(b)(1).

41. *Id.* § 300.7(b)(5).

42. Low intellectual functioning is drastically different from low academic performance. For example, a child who performs below average academically may have the ability to perform at grade level. By contrast, a child with low intellectual abilities may be limited to the point that performing at grade level would never be a possibility.



retardation might be seeking to attain skills "such as using money, taking public transportation, and developing personal hygiene skills" instead of seeking to master more traditional classroom topics.<sup>43</sup>

A "serious emotional disturbance," on the other hand, lacks the severity of mental retardation; "subaverage intellectual functioning" is not a part of its definition. The term "serious emotional disturbance" indicates emotional problems that may or may not result in poor academic performance. Any sub-average academic performance, however, would not be the result of low intellectual functioning.<sup>44</sup> Unfortunately, school districts have shown an inability to deal effectively with children with serious emotional disturbances. The most common short comings have been placing such children in too restrictive a setting, failing to provide them with adequate assistance, or failing to identify the children as having a disability.<sup>45</sup> In fact, a 1990

43. Theresa Glennon, *Disabling Ambiguities: Confronting Barriers to the Education of Students with Emotional Disabilities*, 60 *Tenn. L. Rev.* 295, 301 (1993).

44. The Code of Federal Regulations recognizes the following as characteristics that might indicate a severe emotional disturbance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (C) Inappropriate types of behavior or feelings under normal circumstances;
- (D) A general pervasive mood of unhappiness or depression; or
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(b)(9)(A)-(E).

45. See Glennon, 60 *Tenn. L. Rev.* at 302-03 (cited in note 43) (describing three central deficiencies in the education of children with emotional disabilities: "(1) failure to identify many of the seriously emotionally disturbed children of school age; (2) failure to provide effective programs to those students who are identified as needing special education; and (3) frequent use of overly restrictive settings for children, including residential schools isolated from the students' communities"). Professor Glennon explains:

The school lives of children with emotional disabilities are often marked by confusion, disjuncture, change, and rejection. These children are passed from one teacher and administrator to another, sent home for discipline, or shipped away to a residential school or hospital following a crisis. At these transition points, children may lose important instructional time. Even worse, these children receive repeated messages from the educational system that they are not wanted. Perceiving their school careers as failures, many children with emotional disabilities drop out. Stories of discontinuity and failure are familiar and depressing to these children and their parents, as well as to school personnel and student advocates.

*Id.* at 295.

Glennon also recognizes that "Congress found in 1990 that 'children with serious emotional disturbance remain the most underserved population of students with disabilities.'" *Id.* at 303 (quoting Education of the Handicapped Act Amendments of 1990, H.R. Rep. No. 101-544, 101st Cong., 2d Sess. 39, reprinted in 1990 U.S.C.C.A.N. 1723, 1761).

federal government report estimated that educational systems served only nineteen percent of students with serious emotional disabilities.<sup>46</sup>

The obvious question is how the IDEA attempts to provide for children that have such radically different disabilities as "mental retardation" and "severe emotional disturbance." The IDEA attempts to provide for children with varying degrees of disability through each child's Individualized Education Program ("IEP").<sup>47</sup> The IEP is a written document that serves as the baseline mechanism of the IDEA. It establishes a specific child's educational program.<sup>48</sup> As described by the Ninth Circuit, the IEP is "the substantive procedure" that "ensures that the child's education is tailored to [his or] her individual

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46. *Id.* at 304 (citing Education of the Handicapped Act Amendments of 1990, H.R. Rep. No. 101-544, 101st Cong., 2d Sess. 39, reprinted in 1990 U.S.C.C.A.N. 1723, 1762). Regulations attempt to limit the number of children classified as having a "serious emotional disturbance" to some degree by stating that "socially maladjusted" children do not fall within the definition. 34 C.F.R. § 300.7(b)(9)(ii). However, this limitation is immediately followed by an exception: "unless it is determined that they have a serious emotional disturbance." *Id.* In spite of this circular exception, school districts continue to recognize this limitation so that their ability to take disciplinary action against a problem child will not be diminished. As Professor Glennon has noted:

Officials, however, may be reluctant to identify those aggressive students [who are suffering from an emotional disturbance], especially adolescents, in order to avoid the loss of disciplinary authority. As currently written, the regulations provide some constraints on school decisions, but they do not eliminate the school's significant *de facto* discretionary authority to exclude students from the Act's benefits.

Glennon, 60 Tenn. L. Rev. at 335 n.209 (cited in note 43) (citing Jane Knitzer, Zina Steinberg, and Brahm Fleisch, *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* 9 (Bank Street College of Education, 1990)).

47. The IDEA defines an "individualized education program" as "a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities." 20 U.S.C. § 1401(a)(20). The statement must include:

(1) information on the child's current level of functioning or performance; (2) long-term (typically one school year) goals and short-term objectives that address the child's needs; (3) the specific support services provided to the child; (4) the level of participation in regular education; (5) the starting date and duration of services; and (6) objective criteria and evaluation procedures for measuring achievement of the goals and objectives.

Goldman, 20 U. Dayton L. Rev. at 278 (cited in note 36). See generally Barbara D. Bateman, *Better IEPs: How to Develop Legally Correct and Educationally Useful Programs* 3-13 (Sopriss West, 2d ed. 1996).

48. Senator Stafford, one of the major sponsors of the 1975 Act, described the importance of the IEP in the following manner: "We in Congress did not attempt to define 'appropriato' in the law but instead, we established a hase-line mechanism, a written document called the Individualized Education Program (IEP)." Stafford, 3 Vt. L. Rev. at 75 (cited in note 14). See also *Honig v. Doe*, 484 U.S. 305, 311 (1988) (describing the IEP as "the centerpiece of [the IDEA's] education delivery system"); 34 C.F.R. § 300.342(b)(1) ("An IEP must [b]e in effect before special education and related services are provided to a child . . .").

needs."<sup>49</sup> The problem, however, is uncertainty regarding the IEP's objectives, largely because of Congress's lack of explicit substantive goals.<sup>50</sup> Self-sufficiency, for example, was discussed in the legislative history, yet ignored in the IDEA itself.<sup>51</sup> The task of determining the IEP's goals has been left to the courts, resulting in many children receiving inadequate educations.<sup>52</sup>

### III. IDEA BENEFITS

When deciding what benefits the IDEA guarantees children with disabilities, the courts have attempted to glean substance from what is essentially a procedural statute. The central feature of the statute is the assurance "that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their

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49. *County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1461 (9th Cir. 1996) (citing *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H.*, 14 F.3d 1398, 1400 n.2 (9th Cir. 1994)).

50. "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Board of Educ., Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 190 (1982). Some states, however, do include a substantive standard in their state version of the IDEA. The federal statute merely sets a minimum standard, for which *Rowley* provides the interpretation. A state statute may go beyond the federal standard. See Eileen O. Ordover and Kathleen B. Boundy, *Educational Rights of Children with Disabilities* 10-11 (Center for Law and Education, 1991) (noting that states may set higher quality and benefit standards). For example, Massachusetts requires that educational services designed for a child with disabilities must benefit that child "to the maximum extent feasible." Mass. Gen. Laws Ann. ch. 71B § 3 (West, 1996 ed.). In addition, § 504 of the federal Rehabilitation Act of 1973, Pub. L. 93-112, § 504, 87 Stat. 355, 394, codified as amended at 29 U.S.C. § 794a (1994 ed.), does include substantive standards. An "appropriate education" is defined for purposes of § 504 to be regular or special education and related aids and services "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met." Ordover and Boundy, *Educational Rights* at 11 (cited in this note) (citing 34 C.F.R. § 104.33(b)(1)(i) (1996)).

51. See note 35 and accompanying text.

52. The failures in dealing with children suffering from emotional disturbances have been documented extensively. See Richard S. Neel, et al., *What Happens After Special Education: A Statewide Follow-up Study of Secondary Students Who Have Behavioral Disorders*, 13 *Behav. Disorders* 209, 213 (1988) (noting approximately one-third of emotionally disturbed students surveyed after the end of their education were unemployed); Glennon, 60 *Tenn. L. Rev.* at 334 (cited in note 43) (noting that approximately 28% to 36% of incarcerated juveniles have an emotional disability) (citing Peter E. Leone, *Beyond Fixing Bad Behavior and Bad Boys: Multiple Perspectives on Education and Treatment of Troubled and Troubling Youth*, 1989 *Severe Behav. Disorders Monograph* 1, 4). See also Glennon, 60 *Tenn. L. Rev.* at 296 (cited in note 43) (stating that, in order for children with disabilities to learn necessary and emotional skills, educators should "redefine the content and focus of education for this group of children and determine which array of services will support their educational endeavors"). See generally Alex J. Hurder, *The Individuals with Disabilities Education Act and the Right to Learn*, 24 *Hum. Res.* 16, 16-17 (Winter 1997) (discussing the appropriate educational goals for children with disabilities).

unique needs.”<sup>53</sup> Initially, this Part will examine how courts have defined a “free appropriate public education” (“FAPE”)<sup>54</sup> and discuss the level of education children with mental impairments receive. It will then discuss more specifically the “special education” and “related services” that constitute this “appropriate” education.

### A. Free Appropriate Public Education

#### 1. *Board of Education, Hendrick Hudson Central School District v. Rowley*

The Supreme Court established the standard of education required for students with disabilities in *Board of Education, Hendrick Hudson Central School District v. Rowley*.<sup>55</sup> Although the case did not address the situation of a child with mental retardation or serious emotional disturbance, courts have recognized it to be the preeminent authority in interpreting IDEA standards.<sup>56</sup> Indeed, *Rowley* is the only Supreme Court decision defining IDEA substantive standards.

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53. 20 U.S.C. § 1400(c).

54. Federal Regulations define FAPE as follows:

[T]he term “free appropriate public education” means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;

(b) Meet the standards of the SEA [State Educational Agency], including the requirements of this part;

(c) Include preschool, elementary school, or secondary school education in the State involved; and

(d) Are provided in conformity with an IEP that meets the requirements of §§ 300.340-300.350.

34 C.F.R. § 300.8. See Ordovery and Boundy, *Educational Rights* at 10 (cited in note 50) (defining the components of FAPE as “special education and related services meeting state and IDEA standards provided at public expense, with no cost to parent or child, under public supervision, in conformity with the child’s IEP” and citing 20 U.S.C. § 1401(a)(18)).

55. 458 U.S. 176, 187-204 (1982).

56. See, for example, *M.C. on Behalf of J.C. v. Central Regional School Dist.*, 81 F.3d 389, 393 (3d Cir. 1996), cert. denied, 117 S. Ct. 176, 136 L. Ed. 2d 116 (1996) (considering *Rowley* to be “the principal authority establishing the standard of education services required under IDEA”). The 1982 *Rowley* decision is the sole opinion the Supreme Court has set forth concerning the standard of education required for students with disabilities under the IDEA.

Amy Rowley, a child with deafness, was an elementary school student with an I.Q. of 122.<sup>57</sup> Amy attended kindergarten in a regular classroom for kindergarten and had been provided with an FM hearing aid that amplified teachers' and fellow students' words into a wireless receiver.<sup>58</sup> Amy's parents were dissatisfied with this arrangement because the hearing aid only allowed Amy to identify fifty-nine percent of the words spoken to her.<sup>59</sup> The parents requested that Amy be provided with a sign language interpreter, which would have enabled her to identify all of the words spoken in class.<sup>60</sup> The school denied the parents' request. Because Amy was achieving educational, academic, and social success without an interpreter, an independent examiner, in a separate hearing, agreed that an interpreter was not necessary.<sup>61</sup> After appealing to the State Commissioner of Education,<sup>62</sup> the Rowleys filed suit in the United States District Court for the Southern District of New York, claiming that denial of their request constituted a violation of Amy's right to free appropriate public education as guaranteed by the IDEA.<sup>63</sup>

Responding to the lack of any substantive guidelines in the IDEA,<sup>64</sup> the district court in *Rowley* entertained several possible interpretations of FAPE. First, the court stated that an "adequate education" could be defined as "an education substantial enough to facilitate a child's progress from one grade to another and to enable him or her to earn a high school diploma."<sup>65</sup> The court then stated

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57. *Rowley v. Hendrick Hudson Cent. School Dist., Westchester County Bd. of Educ.*, 483 F. Supp. 528, 528-29, 532 (S.D.N.Y. 1980), *aff'd*, 632 F.2d 945, 955 (2d Cir. 1980), *rev'd and remanded*, 458 U.S. 176, 210 (1982).

58. *Rowley*, 458 U.S. at 184.

59. See *Rowley*, 483 F. Supp. at 531-32 (assessing Amy's ability to discern words with and without various aids and stating that Amy's parents insisted that a sign language interpreter be provided in all of Amy's academic classes).

60. See *id.* at 530, 532 (finding that Amy could identify all words spoken to her when "total communication," a method combining sign language with other communicative tools such as mouthing, amplifications, and visual clues, was employed).

61. *Rowley*, 458 U.S. at 185. See 34 C.F.R. § 300.506(a) ("A parent or a public educational agency may initiate a hearing on any of the matters described in § 300.504(a)(1) and (2)."). See also Ordover and Boundy, *Educational Rights* at 54-56 (cited in note 50) (describing procedures for appealing school decisions).

62. On appeal, the New York Commissioner of Education affirmed the examiner's decision. *Rowley*, 458 U.S. at 185. See 34 C.F.R. § 300.510(a) ("If the hearing is conducted by a public agency other than the SEA [State Educational Agency], any party aggrieved by the findings and decision in the hearing may appeal to the SEA").

63. *Rowley*, 458 U.S. at 185. See 34 C.F.R. § 300.511 ("Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under § 300.510, and any party aggrieved by the decision of a reviewing officer under § 300.510, has the right to bring a civil action under section 615(e)(2) of the Act.").

64. See note 51 and accompanying text.

65. *Rowley*, 483 F. Supp. at 534.

that an "appropriate education" could also be one that "enables the handicapped child to achieve his or her full potential."<sup>66</sup>

Ultimately, the district court struck a middle ground: the interpretation endorsed by the district court would require that "each handicapped child be given an opportunity to achieve his [or her] full potential commensurate with the opportunity provided to other children."<sup>67</sup> The court found this third standard to be most consistent with the federal regulations, with the equal protection decisions that had motivated Congress to pass the IDEA,<sup>68</sup> and with "common sense."<sup>69</sup> Using this interpretation of FAPE, the court held that Amy, without the aid of an interpreter, was not being provided the opportunity to reach a level of potential proportionate to that of her non-handicapped classmates.<sup>70</sup> A divided panel of the United States Court of Appeals for the Second Circuit affirmed this decision,<sup>71</sup> and the Supreme Court granted certiorari.<sup>72</sup>

Although the Supreme Court agreed with the district court's view that the Act lacked an explicit substantive definition of FAPE,<sup>73</sup> it found that the components of FAPE outlined in the Act provided sufficient guidance to school officials.<sup>74</sup> The Court thus established a

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66. *Id.*

67. *Id.* The court clarified that such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by non-handicapped children." *Id.*

68. See notes 16-31 and accompanying text.

69. *Rowley*, 483 F. Supp. at 534.

70. *Id.* at 535. This conclusion was based largely on the fact that, with merely the hearing aid, Amy "underst[ood] considerably less of what goes on in class than she could if she were not deaf." *Id.* at 532.

71. *Rowley v. Board of Educ. of Hendrick Hudson School Dist.*, 632 F.2d 945, 955 (2d Cir. 1980), rev'd and remanded, 458 U.S. 176, 210 (1982). Many reacted quite harshly to this decision. The New York Times criticized the decision in an editorial:

It is only right to remedy a pattern of neglect. But it is perverse for Congress and the courts to define an "appropriate" education only for the handicapped and to write rules that result in the deprivation of other children. The allocation of scarce local resources is necessarily a political matter, best left to local government . . . . It is no favor to the handicapped to make them the beneficiaries of unique rhetorical rights and the object of local resentment.

*Going Wrong with Handicapped Rights*, N.Y. Times 16 (July 19, 1980).

72. *Board of Educ. of Hendrick Hudson School Dist. v. Rowley*, 454 U.S. 961 (1981) (granting certiorari).

73. *Rowley*, 458 U.S. at 187-88.

74. *Id.* at 189. The Court, quoting the EHA, described the components as follows: "[A] 'free appropriate education' consists of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." *Id.* at 188-89. Specifically, the Court stated that "if personalized instruction is being provided with sufficient supportive services to permit the child

dual-pronged inquiry to determine whether the IDEA had been violated.<sup>75</sup> Under this inquiry, a court must first decide whether the State complied with the procedures set forth in the Act.<sup>76</sup> If so, the court must determine whether the individualized educational program developed through the Act's procedures was "reasonably calculated to enable the child to receive educational benefits."<sup>77</sup> Essentially, the Court appeared to require no more than that the school "confer some educational benefit upon the . . . child."<sup>78</sup> Applying this standard, the Court denied the Rowleys' request for a sign language interpreter,<sup>79</sup> finding that all procedures had been properly followed and that Amy was obviously receiving educational benefits. The Court found these benefits to be evidenced by the fact that Amy was performing better than the average student in her class and easily progressing from grade to grade.<sup>80</sup>

The *Rowley* dissent attacked the Court's benefit standard by suggesting it could be satisfied if the school system merely provided Amy Rowley with "a teacher with a loud voice, for she would benefit from that service."<sup>81</sup> The dissent also predicted that the Court's holding would bar any challenge to an IEP due to the the majority's strong deference to correctly followed procedure.<sup>82</sup> Unfortunately, some later decisions have proven the accuracy of these predictions.<sup>83</sup>

## 2. Application of the *Rowley* Standard

Although the Supreme Court has ruled on IDEA standards, confusion and uncertainty still surround the substantive requirements of IDEA. The main reason for this confusion is the limited scope of *Rowley*. Amy Rowley had an I.Q. of 122 and was easily advancing from grade to grade.<sup>84</sup> Presumably in an effort to avoid set-

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to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." *Id.* at 189.

75. *Id.* at 206.

76. *Id.*

77. *Id.* at 206-08.

78. *Id.* at 200.

79. *Id.* at 210.

80. *Id.* at 209-10.

81. *Id.* at 215 (White, J., dissenting).

82. *Id.* at 216-18 (White, J., dissenting).

83. See, for example, *Carlisle Area School v. Scott P. by and through Bess P.*, 62 F.3d 520, 533-34 (3d Cir. 1995), cert. denied, 116 S. Ct. 1419, 134 L. Ed. 2d 544 (1996) (stating that school districts "need not provide the optimal level of services, or even a level that would confer additional benefits, since the IEP required by IDEA represents only a 'basic floor of opportunity'" and citing *Rowley*, 458 U.S. at 201).

84. See notes 57, 80 and accompanying text.

ting a standard that would require school districts to maximize students' potential,<sup>85</sup> the Court articulated the *Rowley* "some educational benefit" standard.<sup>86</sup> This standard was easily applied in the *Rowley* case because grade advancement is a clearly measurable benefit.<sup>87</sup> However, the standard is difficult to apply in cases where children are attempting to learn basic life skills or are trying to overcome an emotional disturbance. In fact, the *Rowley* standard provides nothing but confusion when courts attempt to apply it to benefits outside the scope of pre-established educational criteria such as grade promotion. Two recent cases, one dealing with a child with "mental retardation" and one in which a child suffered from a "serious emotional disturbance," demonstrate this difficulty.<sup>88</sup>

In *M.C. on Behalf of J.C. v. Central Regional School District* ("M.C."),<sup>89</sup> the parents of a sixteen-year-old boy named J.C. who was severely mentally retarded sought to have their son placed in a residential school.<sup>90</sup> A central issue before the court was whether the placement in day school met FAPE requirements.<sup>91</sup> At the administrative hearing, an administrative law judge found that J.C.'s schooling provided him with some educational benefit due to slight improvement "at times" in his ability to perform basic functions, thus

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85. See Goldman, 20 U. Dayton L. Rev. at 258 n.141 (cited in note 36) ("Commentators have argued that cost considerations motivated the Court's use of the minimal benefit standard."); Mark C. Weber, *The Transformation of the Education of The Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. Davis L. Rev. 349, 374 (1990) ("The Act's promise of lavish services for handicapped children was now a grudgingly borne obligation to do the minimum necessary."); Patricia L. Arcuri, Comment, *Statutory Mandate for "Free Appropriate Public Education" Satisfied When Handicapped Benefit From Specialized Instruction and Support Services*, 14 Rutgers L. J. 989, 1004-05 (1983) (concluding that cost considerations motivated the minimal benefit standard); Bonnie Poitras Tucker, Board of Education of Hendrick Hudson Central School District v. Rowley: *Utter Chaos*, 12 J. L. & Educ. 235, 235 (1983) (asserting that cost was the "obvious rationale for the Court's blatant disregard of Congressional intent").

86. See notes 75-77 and accompanying text.

87. The Court was convinced that Amy was benefiting since she was advancing from grade to grade. See note 80 and accompanying text.

88. See *M.C.*, 81 F.3d at 393 (adjudicating the claims of parents of a child with "severe mental retarda[tion]" who challenged their child's IEP); *County of San Diego v. California Speeial Educ. Hearing Office*, 93 F.3d at 1461-62 (addressing a California county's challenge to the state's classification of a student as "seriously emotionally disturbed").

89. 81 F.3d 389, 391-92 (3d Cir. 1996).

90. *Id.* at 393. They challenged his day placement, seeking a residential placement instead. *Id.* Although placement decisions will be discussed in depth later in this Note, see Part III.B.2, it is important to note that under the IDEA, a child may receive any of a variety of placements. See 20 U.S.C. § 1401 (a)(16) (including instruction conducted in classrooms, homes, hospitals and institutions in the definition of "special education"). Indeed, it is this issue of placement, in one form or another, that generates the vast majority of IDEA caselaw.

91. *M.C.*, 81 F.3d at 394.



satisfying the *Rowley* requirement.<sup>92</sup> The district court disagreed, finding that "an appropriate IEP must result in more than *de minimis* benefits to satisfy *Rowley's* 'some educational benefit' standard."<sup>93</sup> Referring to a previous Third Circuit opinion, the district court clarified that "a plan for a severely handicapped student will satisfy the IDEA only if it is 'likely to produce progress, not regression or trivial educational advancement.'"<sup>94</sup> The Third Circuit agreed with the district court's conclusion.<sup>95</sup> Applying this standard, the Third Circuit concluded that J.C.'s day placement was inadequate.<sup>96</sup> The court based its decision largely on expert testimony claiming that "J.C. was capable of more than the *de minimis* results he realized at . . . [the day placement], but that he needed the intensive, round-the-clock instruction of a residential school to receive meaningful benefit from his education."<sup>97</sup> The use of the term "meaningful"<sup>98</sup> and the court's focus on J.C.'s potential appear to extend the IDEA beyond the *Rowley* Court's interpretation.<sup>99</sup>

92. *Id.* at 392-93. The judge noted J.C.'s occasional improvements in his ability to "prepare himself to toilet, eat with a spoon, and drink from a cup." *Id.* at 392.

93. *Id.* at 393 (discussing the district court hearing and order of residential placement).

94. *Id.* at 393 (discussing the district court's decision and quoting *Board of Educ. v. Diamond*, 808 F.2d 987, 991 (3d Cir. 1986)).

95. *Id.*

96. *Id.* at 394.

97. *Id.* at 393 (discussing the testimony of Dr. Dana Henning at the district court hearing).

98. The *Rowley* Court used the term "meaningful," but equated it to access:

Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful*. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

*Rowley*, 458 U.S. at 192 (emphasis added) (citation omitted) (quoting S. Rep. No. 94-168 at 11 (cited in note 34)).

99. See Ordover and Boundy, *Educational Rights* at 18 n.12 (cited in note 50) (citing *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990) (holding that the child must benefit meaningfully within his or her potential)); *Doe by and through Doe v. Smith*, 879 F.2d 1340, 1341 (6th Cir. 1989) (holding that the benefit must be "more than *de minimis*" but need not "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children"); *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171, 184-85 (3d Cir. 1988) (holding that a *de minimis* or trivial benefit is insufficient and determining that whether a benefit is *de minimis* must be gauged in reference to the child's potential); *Hall by Hall v. Vance County Bd. of Educ.*, 774 F.2d 629, 636 (4th Cir. 1985) ("Clearly, Congress did not intend that a school system could discharge its duty . . . by providing a program that produces some minimal academic advancement, no matter how trivial."); *Johnson v. Lancaster-Lebanon Intermediate Unit 13, Lancaster City School Dist.*, 757 F. Supp. 606, 618 (E.D. Pa. 1991) (holding that an educational program must be sufficient for a student to make "meaningful educational progress"); *Chris D. v. Montgomery County Bd. of Educ.*, 743 F. Supp. 1524, 1531 (M.D. Ala. 1990) (rejecting an implicit school board contention that "a benefit is conferred anytime a student is not left to vegetate").

The Ninth Circuit imposed a similar strict benefit standard in *County of San Diego v. California Special Education Hearing Office* ("*Fox*").<sup>100</sup> Rosalind Fox, a high-school-aged female, was diagnosed as being seriously emotionally disturbed ("SED") "on the basis of an inability to learn which . . . [could not] be explained by intellectual, sensory or health factors, and inappropriate types of behaviors or feelings under normal circumstances."<sup>101</sup> The Ninth Circuit found that because Rosalind had been diagnosed as SED and was not merely learning disabled, her goals should include behavioral and emotional growth, as well as academic benefits.<sup>102</sup>

*Fox*, therefore, also imposes a more stringent "benefit" standard than the one set forth in *Rowley*, but this time for a child suffering from a serious emotional disturbance. The *Fox* court said that the "correct" standard for measuring educational benefit under the IDEA is not merely "whether the placement is 'reasonably calculated to provide the child with educational benefits,' but rather, whether the child makes progress toward the goals set forth in her IEP."<sup>103</sup> Requiring that the IEP help Rosalind improve in controlling her anger, reducing her tendency toward truancy, or diminishing her frustration over academic work, the Ninth Circuit found that an "appropriate education" includes not only an accumulation of academic credit but also provision of the guidance needed to succeed in life.<sup>104</sup>

The *M.C.* and *Fox* decisions' focus on goals beyond mere academic benefits illustrates *Rowley*'s comparatively narrow scope. Amy Rowley did not require another type of aid to benefit educationally. This is apparent in the Supreme Court's conclusion that she was progressing socially as well as academically,<sup>105</sup> and the district court's finding that Amy was " 'a remarkably well-adjusted child' who interact[ed] and communicat[ed] well with her classmates and ha[d] 'developed an extraordinary rapport' with her teachers."<sup>106</sup>

In comparison, the courts in *Fox* and *M.C.* were forced to decide cases in which children needed far more than academic train-

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100. 93 F.3d 1458 (9th Cir. 1994).

101. *Id.* at 1463.

102. *Id.* at 1468.

103. *Id.* at 1467.

104. *Id.*

105. *Rowley*, 458 U.S. at 185.

106. *Id.* (quoting *Rowley*, 483 F. Supp. at 531).

ing.<sup>107</sup> Presented with such a situation, the *Fox* and *M.C.* courts shifted their focus from academic progress to social and emotional fulfillment and the attainment of basic skills necessary to live.<sup>108</sup> The courts' goal appears to be children's self-sufficiency, as evidenced by their requirements that school systems help children learn to cope with their disabilities.<sup>109</sup> The Supreme Court did not appear to go this far in *Rowley*, arguably because it did not have to—Amy was advancing fine both academically and socially.<sup>110</sup> In fact, the *Rowley* opinion can be viewed as being consistent with the *M.C.* and *Fox* decisions; in *Rowley*, the school system was preparing Amy to be self-sufficient. The only distinguishing factor among these cases is the severity of the disabilities suffered by the children, not the standard applied by the courts.<sup>111</sup>

Many courts, however, continue to view *Rowley* as a broad-reaching opinion and apply the *Rowley* "some educational benefit" standard in all situations. This broad *Rowley* interpretation is evident in the district court's opinion in *M.C.* and in cases such as *Doe by and through Doe v. Board of Education of State of Connecticut*,<sup>112</sup> where a district court denied "special education"<sup>113</sup> to a child with an emotional disturbance because of his satisfactory academic performance.<sup>114</sup>

107. See notes 90, 101 and accompanying text.

108. See notes 92-95, 105 and accompanying text.

109. See notes 94, 104 and accompanying text.

110. See note 61.

111. See *Rowley*, 458 U.S. at 189 (stating that a child's placement should include "educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction"). See also *California Special Educ. Hearing Office*, 93 F.3d at 1468 (quoting *Rowley*, 458 U.S. at 189).

112. 753 F. Supp. 65, 65 (D. Conn. 1990).

113. The Code of Federal Regulations defines the term "special education" as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability." 34 C.F.R. § 300.17(a)(1). This "specially designed instruction" is outlined in a child's IEP, which must be completed before special education or related services can be provided. 34 C.F.R. § 300.346(a)(3)-(4); 34 C.F.R. § 300.342(b)(1).

114. The district court noted that the child's "academic performance (both his grades and achievement test results) before, during, and after his hospitalization were satisfactory or above." *Doe by and through Doe*, 753 F. Supp. at 70. The problem with this reasoning is that the child will never be able to become fully self-sufficient until he or she learns to manage his or her disability. The true goal of the IDEA, self-sufficiency, would then be compromised. The situation in *Doe* is not unique. If children perform moderately well, they will likely never be identified as requiring "special education." As Professor Glennon has noted, "the majority of children with serious emotional disabilities are not even in the special education system." Glennon, 60 Tenn. L. Rev. at 304 (cited in note 43). She makes this statement in reference to several reputable studies. *Id.* at 303-04 (citing Education of the Handicapped Act Amendments of 1990, H.R. Rep. No. 101-544, 101st Cong., 2d Sess. 39 (1990), reprinted in 1990 U.S.S.C.A.N. 1723, 1761-62, which states that "children with serious emotional disturbance remain the most

A broad interpretation of *Rowley* has a negative impact on children with disabilities. This impact is illustrated by the incredibly low identification rates of children with emotional disturbances<sup>115</sup> and the alarming arrest and incarceration rates of such children.<sup>116</sup> The negative effects are exacerbated by the disturbing fact that the better a child with mental impairments performs in school, the more limited his or her chances are of receiving special services or of being classified as having a disability in the first place.<sup>117</sup> Unfortunately, children with more severe disabilities receive better care under the IDEA,<sup>118</sup> and children with less severe impairments often receive neither treatment nor recognition.<sup>119</sup>

These negative effects stem from the disturbing fact that the nation's highest court requires that the public schools provide children no more than "some educational benefit." *Rowley* should therefore be attacked on its face, due to its lack of logic and the destructive force of its language.

### 3. Problems with *Rowley*

The Court's analysis in *Rowley* is flawed for several reasons. First, its reliance on the term "educational benefits" is misplaced.<sup>120</sup> The Court extracted the term from the IDEA's definition of "related services": "transportation, and such developmental, corrective, and

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underserved population of students with disabilities" and estimates that "only 19% of the students with serious emotional disturbance are receiving a free appropriate education". See also Office of Special Education Programs, U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Fourteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act A-50*, Appendix A (U.S. G.P.O., 1992) (stating that American schools identify 0.89% of children between the ages of six and seventeen as seriously emotionally disturbed).

115. See note 46 and accompanying text.

116. See note 234 and accompanying text.

117. See Glennon, 60 Tenn. L. Rev. at 306-07 (cited in note 43) (lamenting the fact that the majority of IEP's for seriously emotionally disturbed children fail to set behavioral, social, or emotional goals that provide children with skills to manage the feelings that lead to disruptive behavior and other problems that prevent them from reaching their potential).

118. See, for example, *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990) (stating that a child must benefit meaningfully within his or her potential but dealing with a child suffering from "severe developmental delays following an autistic pattern"); *Polk*, 853 F.2d at 173 (holding that a *de minimis* benefit was insufficient and noting that because the child was both mentally retarded and severely developmentally disabled, the benefits determination must be gauged in relation to the child's potential).

119. For a brief discussion of the reasons for this failure to identify children with serious emotional disturbances, see note 46.

120. See *Rowley*, 458 U.S. at 207-08.

other supportive services . . . as may be required to assist a [child with disabilities] to benefit from special education."<sup>121</sup> This language, which does not even define FAPE, certainly should not be used to find that a child with disabilities is entitled to nothing more under the IDEA than "some educational benefit."<sup>122</sup>

The *Rowley* Court also relied heavily on legislative history to show that the IDEA was created to make public education available to children with disabilities rather than to guarantee any particular level of education.<sup>123</sup> The Court emphasized repeated references in the legislative history to the exclusion of handicapped children from public education.<sup>124</sup> In presenting what it viewed as unmistakable proof that the inclusion of children with disabilities constitutes an "appropriate education,"<sup>125</sup> the Court tied separate Senate Report statements together.<sup>126</sup> The Report states that (1) out of eight million handicapped children, only 3.9 million were being served, and (2) only 3.9 million handicapped children were receiving an appropriate education.<sup>127</sup> According to the Court, since the number of children with disabilities "being served" equaled the number receiving an appropriate education, Congress "unmistakably" intended simply to include handicapped children in public education.<sup>128</sup>

The Court's reliance on such language as conclusive proof is confusing. If Congress had no greater desire than simply to include handicapped children in the educational process, then why did it not require explicitly mere inclusion in the Act? In addition, the repeated reference to the number of children being "unserved" should not constitute conclusive proof that the statute was enacted simply to include these children in the educational process. In fact, the language could support the idea that Congress emphasized the inadequacies of the current system to garner support for its intent to institute radical improvements in the education of children suffering from disabilities.<sup>129</sup> Finally, the Court's rationale ignores other equally valid legis-

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121. *Id.* at 189 (emphasis added) (citing 20 U.S.C. § 1401(17) (1976 ed. & Supp. IV)).

122. As stated by the Court, "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Id.* at 192.

123. *Id.*

124. See generally *id.* at 191-204 nn.12-26 (discussing the legislative history surrounding the enactment of the EHA).

125. *Id.* at 197.

126. *Id.* at 195 (citing S. Rep. No. 94-168 at 8 (cited in note 34)).

127. *Id.* at 197 (citing S. Rep. No. 94-168 at 8 (cited in note 34)).

128. *Id.*

129. This explanation seems possible considering Congress's desire to provide these children with the skills to be self-sufficient. See note 35 and accompanying text.

lative history. For example, the report indicates that the IDEA does “guarantee that handicapped children are provided *equal* educational opportunity.”<sup>130</sup> Similarly, Senator Stafford, one of the Act’s chief proponents, declared that “[w]e can all agree that . . . education [given to a child with disabilities] should be equivalent, at least, to the one those children who are not handicapped receive.”<sup>131</sup> Thus, the Court’s determination that the intent was “unmistakable” is questionable.

Regardless of its shortcomings, however, the *Rowley* decision serves as the interpretational basis for educational opportunities under the IDEA.

### B. Special Education

The IDEA requires that a state provide a child with disabilities not only a free appropriate public education,<sup>132</sup> but also “special education and related services designed to meet . . . [a child’s] unique needs.”<sup>133</sup> To the general public, the term “special education” carries a negative implication. The popular notion of special education is a

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130. *Rowley*, 458 U.S. at 214 (White, J., dissenting) (emphasis added) (citing S. Rep. No. 94-168 at 9 (cited in note 34)). See also 121 Cong. Rec. 19482-19483 (June 18, 1975) (remarks of Senator Randolph) (discussing the need to provide full educational opportunities to all children with disabilities); id. at 19504 (remarks of Senator Humphrey) (noting that almost three million handicapped children, “while in school, received none of the special services that they require in order to make education a meaningful experience”); id. at 19505 (remarks of Senator Beall) (stressing the importance of education and expressing a desire to stimulate the potential of individuals with disabilities); 121 Cong. Rec. 23704 (July 21, 1975) (remarks of Representative Brademas) (distinguishing between children with disabilities who are receiving an “inappropriate education” and those who are receiving “no educational services at all”); 121 Cong. Rec. 25538 (July 29, 1975) (remarks of Representative Cornell) (differentiating between children who were receiving an “inappropriate education” and those who were “deprived of any educational instruction or training”); id. at 25540 (remarks of Representative Grassley) (noting that “handicapped children have always been slighted on equal educational opportunity”); 121 Cong. Rec. 37025 (Nov. 18, 1975) (remarks of Representative Perkins) (discussing “court decisions . . . requiring full educational opportunity” and stating that the federal government should assume financial responsibility in providing this opportunity); id. at 37030 (remarks of Representative Mink) (distinguishing between children with disabilities who are “totally excluded from our educational system” and those children who “do not receive an appropriate education”); 121 Cong. Rec. 37412 (Nov. 19, 1975) (remarks of Senator Taft) (stating that the American educational system must “offer the opportunity for the fulfillment of the potential abilities of all children,” especially children with disabilities); id. at 37413 (remarks of Senator Williams) (recognizing that all children have an “equal right to education” and that, in the past, children with disabilities were excluded); id. at 37419 (remarks of Senator Cranston) (stating that the enactment of the EHA would result in the “broadening of equal opportunity for all handicapped children”); id. at 37419-20 (remarks of Senator Beall) (wishing to ensure “free and equal educational opportunities for the handicapped”).

131. 121 Cong. Rec. 19483 (June 18, 1975) (remarks of Senator Stafford).

132. See note 54 for the definition of FAPE in the Code of Federal Regulations.

133. 20 U.S.C. § 1400(c).

small class segregated from other children led by a teacher trained in meeting the needs of children with disabilities.<sup>134</sup> As used in the IDEA, however, the term is broader, representing "specially designed instruction . . . to meet the unique needs of a child with a disability."<sup>135</sup> This specially designed instruction is the program set forth in an IEP.<sup>136</sup> Thus, "special education" is simply a general term for the education provided to a child with disabilities under the IDEA, encompassing two narrow issues: related services and placement.<sup>137</sup> By analyzing these two issues, this Part will attempt to determine how school systems provide the "appropriate" education required by the IDEA and whether the education truly is designed to meet the unique needs of children with mental impairments.

### 1. Related Services

As defined in the IDEA, related services consist primarily of "transportation and such developmental, corrective and other supportive services . . . as may be required to assist a child with a disability to benefit from special education."<sup>138</sup> These services include psychological services;<sup>139</sup> medical services for diagnostic and evaluation purposes;<sup>140</sup> and counseling services provided by "social workers, psychologists, guidance counselors, or other qualified personnel."<sup>141</sup>

As discussed earlier, children who suffer from less severe disabilities are often provided little or nothing in the form of related services.<sup>142</sup> Some children are therefore often denied much needed counseling and psychological services.<sup>143</sup> A child suffering from an emotional disturbance is particularly harmed by this result because

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134. See Goldman, 20 U. Dayton L. Rev. at 246-47 (cited in note 36) (discussing the historical educational treatment of children with disabilities).

135. 20 U.S.C. § 1401(a)(16).

136. See notes 47-48 and accompanying text.

137. See notes 132-133 and accompanying text.

138. 20 U.S.C. § 1401(a)(17).

139. 34 C.F.R. § 300.16(a), (b)(8).

140. Id. § 300.16(a), (b)(4).

141. Id. § 300.16(a), (b)(2).

142. See note 46 and accompanying text.

143. In her 1992 article concerning children with emotional disabilities, Theresa Glennon noted that one study found that 58% of school districts surveyed had failed to provide any counseling services and that only 10% of emotionally disturbed students in the surveyed school districts received psychological services from their schools. Glennon, 60 Tenn. L. Rev. at 307-08 (cited in note 43) (citing Jane Knitzer, Zina Steinberg, and Brahm Fleisch, *At the Schoolhouse Door: An Examination of Programs and Policies for Children with Behavioral and Emotional Problems* 14 (Bank Street College of Education, 1990)).

he or she is often shuttled through the system without ever having his or her unique, individual needs addressed.<sup>144</sup>

Children with emotional disturbances are also often denied services other than counseling. In *Field v. Haddonfield Board of Education*,<sup>145</sup> for example, the parents of an emotionally disturbed teenager named Daniel sought an order to require the school district to pay the costs of a drug treatment program for their son.<sup>146</sup> Daniel had been expelled from his residential placement for possessing Valium, and the treatment program was required for readmittance.<sup>147</sup> The assistant director of Daniel's placement facility stated that the drug possession might have resulted from his emotional disturbance.<sup>148</sup> The court nonetheless held that the substance abuse program was a medical service for which the plaintiffs—not the school district—had to pay.<sup>149</sup>

In reaching that decision, the *Field* court relied on the Supreme Court's decision in *Irving Independent School District v. Tatro*.<sup>150</sup> In *Tatro*, the Court recognized that the IDEA's definition of "medical services"<sup>151</sup> stemmed from Congress's desire to limit a school's obligation to provide expensive services.<sup>152</sup> *Tatro* set forth a two-part inquiry.<sup>153</sup> To be a valid related service, the service must assist the disabled child in benefiting from special education<sup>154</sup> and must not be a medical service going beyond diagnosis or evaluation.<sup>155</sup> The Supreme Court found that this standard relieved school districts from having to pay for services that were strictly medical in nature,

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144. *Id.* at 307 (noting the lack of social work services, individual and family counseling services, and therapeutic recreation services in many school districts).

145. 769 F. Supp. 1313 (D.N.J. 1991).

146. *Id.* at 1315.

147. *Id.* at 1318-19.

148. *Id.* at 1318.

149. *Id.* at 1327-29.

150. 468 U.S. 883 (1984).

151. "Medical services" are "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 C.F.R. § 300.16(b)(4).

152. *Tatro*, 468 U.S. at 892. Congress sought to "spare schools from an obligation to provide a service that might well prove unduly expensive and beyond the range of their competence." *Id.* at 892.

153. *Id.* at 890.

154. *Id.* (agreeing with the appellate court's decision in *Tatro v. State of Texas*, 703 F.2d 823, 827, 831 (5th Cir. 1983), *aff'd* in part and *rev'd* in part, 468 U.S. 883, 888 (1983)).

155. *Id.* at 890-93. See also 20 U.S.C. § 1401(a)(17) (related services include "medical services, except that such medical services shall be for diagnostic and evaluation purposes only").



such as physician and hospital services.<sup>156</sup> Perceiving a substance abuse program to be purely medical, the *Field* court denied the parents' request for payment.<sup>157</sup>

To help a child reach a state of self-sufficiency, the child's IEP should include counseling, psychological services, and drug treatment when required. Courts have not required school districts to provide such treatment, however, for the same reason *Rowley* did not impose a potential maximization standard—cost concerns. While the *Rowley* Court's cost consideration arguably was legitimate, such cost concerns should not act as a barrier to prevent children from obtaining basic skills necessary to achieve self-sufficiency. The *Field* decision<sup>158</sup> demonstrates an overall unwillingness on the part of Congress, the courts, and the school districts to make all children self-sufficient whenever possible.

## 2. Placement

### a. Residential Placement

Once a school district or court decides to provide special education and related services to a disabled child, it must then determine where the child should receive the services. The Act requires that each school district provide a "continuum of alternative placements" for special instruction.<sup>159</sup>

For students with more severe disabilities, such as those classified as "mentally retarded" or those unable to perform in the regular school setting, a specialized placement is often required.<sup>160</sup> IDEA

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156. *Id.* at 892. See also *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 693 (3d Cir. 1981) (stating that the analysis should focus on "whether full-time placement may be considered necessary for educational purposes, or whether the residential placement is a response to medical, social or emotional problems that are segregable from the learning process").

157. *Field*, 769 F. Supp. at 1325-28. But see Ordover and Boundy, *Educational Rights* at 26-27 (cited in note 50) (stating that if a student is eligible for "special education and related services under IDEA because of some other condition and has a substance abuse problem that interferes with his or her ability to benefit from special education," he or she is entitled to supportive related services aimed at the substance abuse problem).

158. See note 145 and accompanying text.

159. 34 C.F.R. § 300.551(a). Possible placements include instruction in regular or special classes, instruction in special schools, instruction at home, and instruction in hospitals and institutions. 34 C.F.R. § 300.551(b)(1).

160. See generally David C. Donohue, Note, *Clovis Unified School District v. California Office of Administrative Hearings: Restricting Related Services Under the Individuals with Disabilities Education Act*, 8 J. Contemp. Health L. & Pol. 407, 411 (1992) (discussing the IDEA

regulations require placement in a public or private residential program at no cost to parents if such placement is necessary "to provide special education and related services to a child with a disability."<sup>161</sup> Because of the extraordinary costs, however, school districts frequently attempt to avoid residential placements, even if they are necessary to accomplish a child's IEP goals.<sup>162</sup> Courts faced with a school district's denial of residential placement typically attempt to determine whether such placement is required for educational progress, as opposed to furthering broad mental health goals, and also whether such placement constitutes a medical service exempt from the IDEA.<sup>163</sup>

In *Clovis Unified School District v. California Office of Administrative Hearings*,<sup>164</sup> the Ninth Circuit found a school district was not required to pay for the residential placement of a young girl with a serious emotional disturbance named Michelle Shorey.<sup>165</sup> Michelle's adoptive parents placed her in King's View Hospital, an acute care psychological hospital,<sup>166</sup> after she was asked to leave several previous placements because of her destructive behavior.<sup>167</sup> The Shoreys paid for Michelle's placement at King's View until their medical insurance expired, at which point they sought to have the

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requirement that school systems pay for residential placement if the placement is "necessary to deliver special education to a disabled child").

161. 34 C.F.R. § 300.302.

162. Donohue, 8 J. Contemp. Health L. & Pol. at 408 n.15 (cited in note 160) (citing Dixie Snow Huefner, *Special Education Residential Placements Under the Education of All Handicapped Children Act*, 18 J. L. & Educ. 411, 413 (1989) (stating that expenses for residential placement typically range from \$20,000 to \$75,000 per year for each student)).

163. Glennon, 60 Tenn. L. Rev. at 339 (cited in note 43). See 34 C.F.R. §§ 300.16(a), (b)(4) (defining related services and medical services). See also *Los Gatos Joint Union High Sch. Dist. v. Doe*, 1984-1985 Educ. Handicapped L. Rep. (LRP Publications) DEC. 556:281, 556:281-82 (N.D. Cal. 1984) (holding that a student suffering from a form of schizophrenia was hospitalized for primarily medical reasons and that the school district was not liable for the cost of services provided to the student); *Metropolitan Gov't of Nashville and Davidson County v. Tennessee Dep't of Educ.*, 771 S.W.2d 427, 428-30 (Tenn. Ct. App. 1989) (holding that placement of a student with disabilities in a private psychiatric unit was for medical reasons rather than for educational purposes).

164. 903 F.2d 635 (9th Cir. 1990).

165. *Id.* at 644-47. Michelle's disturbance was apparently the "result of an extremely unstable and chaotic childhood, including neglect and abuse in eight or nine different placements before her ultimate adoption" by the Shoreys. *Id.* at 639.

166. *Id.* at 639.

167. *Id.* The mental health director recommended the move after informing the Shoreys that Michelle's behavior had deteriorated to the extent that the "staff could no longer control her." This same destructive behavior had led to Michelle's removal from previous placements. *Id.*

school system cover the costs of that placement.<sup>168</sup> The school system refused, recommending less expensive alternative placements that Michelle's parents claimed would not have provided the care Michelle needed.<sup>169</sup> The school district argued that the King's View placement was a " 'medical service' for which the school district is not financially liable under the Act, even if it is related to Michelle's education in the sense that she cannot *fully* benefit from her education without it."<sup>170</sup> The Shoreys, however, argued that this treatment was necessary for Michelle to gain *any* benefit from her education.<sup>171</sup>

Initially, the court explained that it was not bound by *Tatro's* two-part test<sup>172</sup> since that case had not dealt with a residential placement.<sup>173</sup> The court rejected as overinclusive the Shoreys' suggestion that the "only relevant inquiry under the *Tatro* test is whether the service provided is supportive of a handicapped child's education."<sup>174</sup> The court explained that, under this view, all medical services could be considered related services since such services would always help a child benefit from his or her special education program.<sup>175</sup> The *Clovis* court instead focused on whether Michelle's placement could be considered "necessary for educational purposes," or whether the placement was "a [necessary] response to medical, social, or emotional problems . . . quite apart from the learning process."<sup>176</sup> Applying this

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168. *Id.*

169. *Id.* The school's recommendation would have cost approximately \$50,000 per year, while King's View's recommendation would have cost \$150,000. *Id.*

170. *Id.* at 642 (emphasis added).

171. *Id.* Although Michelle had previously "performed adequately in the classroom," her parents argued she was having a very hard time remaining at any placement as a result of her disruptive behavior. *Id.* at 639.

172. See notes 153-55 and accompanying text.

173. *Clovis Unified Sch. Dist.*, 903 F.2d at 642. In *Tatro*, the plaintiff was an eight-year-old girl who suffered from a neurogenic bladder and who required insertion of a catheter into her urethra to empty her bladder every three or four hours. *Tatro*, 468 U.S. at 885. The *Clovis Unified School District* court did state, however, that the *Tatro* standards were "helpful." *Clovis Unified School Dist.*, 903 F.2d at 642.

174. *Id.* at 643.

175. *Id.* The court also rejected the line of reasoning used in *Vander Malle v. Ambach*, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987), that required states to pay for placement costs where "medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem." *Clovis Unified School Dist.*, 903 F.2d at 643. See also *Papacoda v. State of Connecticut*, 528 F. Supp. 68, 71-72 (D. Conn. 1981) (holding that when the very purpose of placing a student in special education school was to provide educational services in a therapeutic environment in which such services would be effective, a state could be required to pay all reasonable costs of the student's education in school, including room and board, through the student's graduation); *North v. District of Columbia Bd. of Educ.*, 471 F. Supp. 136, 141 (D.D.C. 1979) (requiring a school system to pay for a residential academic program when a child's needs for his social, emotional, medical, and educational problems were inextricably intertwined).

176. *Clovis Unified School Dist.*, 903 F.2d at 643.

standard, the court concluded that the IDEA did not require the school district to pay for Michelle's hospitalization.<sup>177</sup> In essence, the court denied Michelle the service she needed to benefit from education, arguably in the interest of fiscal responsibility.<sup>178</sup>

The Second Circuit reached a different conclusion in *Mrs. B. v. Milford Board of Education*.<sup>179</sup> In that case, M.M., a seventeen-year-old girl, suffered from serious social and emotional disabilities greatly affecting her ability to learn.<sup>180</sup> M.M. was undergoing psychotherapy as part of her IEP<sup>181</sup> when her evaluator recommended she be placed in a full-time residential treatment program.<sup>182</sup> The planning and placement team refused to recommend residential placement despite M.M.'s increasingly disruptive and aggressive behavior.<sup>183</sup> Instead, the Department of Child and Youth Services arranged the placement, and M.M.'s mother was forced to cover all costs deemed non-educational.<sup>184</sup>

The Second Circuit found the central question in residential placement cases to be whether the child "requires the residential program to receive educational benefit."<sup>185</sup> The court in *Mrs. B* concluded that the school board was wrong to decide only to pay for the educational component of the placement.<sup>186</sup> The court stated "[i]f institutionalization is required due to a child's emotional problems, and the child's emotional problems prevent the child from making meaningful educational progress, the Act requires the state to pay for

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177. *Id.* at 645-47. The court provided as reasons for its conclusions (1) Michelle's acute psychiatric crisis, which had caused the hospitalization, (2) the hospital program's determination by a medical team and focus on psychiatric needs, (3) the cost of King's View, and (4) the hospital's lack of educational services. *Id.* at 645-46.

178. "Clovis provides a foothold for those who would deny services and opportunities to disabled individuals, while hiding behind the cause of fiscal responsibility." Donohue, 8 J. Contemp. Health L. & Pol'y at 427 (cited in note 160) (citing Dixie Snow Huefner, *Special Education Residential Placements Under the Education of All Handicapped Children Act*, 18 J. L. & Educ. 411, 436-37 (1989)).

179. 103 F.3d 1114 (2d Cir. 1997).

180. *Id.* at 1116. M.M.'s problems included hyperactivity, an inability to interact with others, and lack of self-confidence. *Id.*

181. She underwent psychotherapy at Milford Mental Health Center, a community-based therapy center, as a service related to her special education program. *Id.*

182. *Id.* at 1117. The evaluator stated that a residential setting was "necessary to 'provide structured and consistent limits and expectations while providing for the development of age appropriate social skills.'" *Id.*

183. *Id.* at 1117 ("In virtually all of her classes, she failed to meet basic academic and behavior standards.").

184. *Id.* at 1117-18

185. *Id.* at 1122 (citing *Abrahamson v. Hershman*, 701 F.2d 223, 227-28 (1st Cir. 1983)).

186. *Id.* at 1122.

the costs of the placement."<sup>187</sup> The court held that the state had to fund the placement program because it was necessary for M.M. to make educational progress;<sup>188</sup> the fact that M.M. was placed in the residential program because of her emotional problems was irrelevant.

The inconsistent decisions regarding residential placement indicate that each court decides such cases based on its perception of how responsible a school system should be when educating children with disabilities.<sup>189</sup> If the IDEA's goal is to promote a disabled child's independence and self-sufficiency,<sup>190</sup> the reasonable approach is that taken by the Second Circuit in *Mrs. B*. While this approach is more expensive for school districts, the alternative results in many individuals' inability to become productive members of society.

### b. *Mainstreaming*

Although some children with severe mental disturbances will require specialized placement, as discussed above, the IDEA indicates a preference for instructing "children with disabilities" in regular classrooms,<sup>191</sup> a practice known as "mainstreaming" or "inclusion."<sup>192</sup>

187. *Id.* This passage echoes *Vander Malle*, 667 F. Supp. at 1039. See note 175.

188. *Mrs. B*, 103 F.3d at 1122.

189. See *Ordover and Boundy, Educational Rights* at 25 (cited in note 50) (referring to cases in which school systems were held responsible for the entire cost of placement, cases in which they were held responsible for room and board but not psychotherapy, cases in which they were not held responsible for room and board or psychotherapy but had to pay tuition, and cases in which they were not held responsible for any costs at all).

190. See note 35 and accompanying text.

191. Specifically, the IDEA states that "[r]emoval of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).

192. Martha M. McCarthy explains the difference between the two terms in the following manner:

"Inclusion" is a state-of-the-art term; it is not mentioned in the IDEA. In a fully inclusive model, students with disabilities, no matter how severe, are taught in the regular education classroom of their home school with their age and grade peers for the full day with support services provided within that classroom. In short, inclusion means bringing support services to the child rather than moving the child to a segregated setting to receive special services. Inclusion differs from mainstreaming, which refers to integrating children with disabilities and nonhandicapped children for a portion of the day, usually at times when the regular education program does not have to be significantly modified to accommodate children with disabilities, such as nonacademic periods.

Martha M. McCarthy, *Inclusion of Children with Disabilities: Is It Required?*, 95 *Educ. L. Rep.* at 823, 824 (West 1995) (cited in note 191). Because this Note is only considering this issue as it relates to the general IDEA framework, it will simply use the term "mainstreaming" to refer to the general concept of including disabled children in the regular classroom. See *Oberti v. Board of Educ. of Borough of Clementon School Dist.*, 995 F.2d 1204, 1207 n.1 (3d Cir. 1993) ("While 'inclusion' may be a more precise term, we will nonetheless use the term

When mainstreaming is not possible due to the severity of a child's handicap, the IDEA requires the school district choose the "least restrictive" of the remaining placements.<sup>193</sup> The rationale underlying this requirement echoes the overall goal of self-sufficiency: the concern that children receive the "most normal [education] possible . . . [in the] least restrictive setting . . . [to] adapt to the world beyond the educational environment and . . . [to allow] the nonhandicapped [to] adapt to them."<sup>194</sup>

Unlike residential placement, the focus of mainstreaming is frequently on children with less severe disabilities. Problems arise when school districts unnecessarily move these children to a special education classroom or some other restrictive placement. This problem occurs quite frequently, due in part to the tension between the federal law's requirements that a school district provide children with disabilities education in the "least restrictive environment" while at the same time providing appropriate, individualized programs.<sup>195</sup>

In *Roncker on Behalf of Roncker v. Walter*,<sup>196</sup> the Sixth Circuit attempted to establish a test for mainstreaming that would "capture[] the policy mandates of individualization, appropriateness, and least restrictive environment."<sup>197</sup> In *Roncker*, the parents of a nine-year-old boy who had been classified as "trainably mentally retarded" sought to include their son in a regular classroom.<sup>198</sup> They believed that "he would benefit from contact with nonhandicapped children."<sup>199</sup> The school district sought to place the child in a "county school" that served only mentally retarded children.

The *Roncker* test analyzes the rationale of selecting a segregated facility and determines whether the same services could feasi-

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'mainstreaming' because it is currently the common parlance."). For a general discussion of mainstreaming, see generally Goldman, 20 U. Dayton L. Rev. at 260-76 (cited in note 36) (discussing the "least restrictive environment" directive imposed upon the states by the IDEA); McCarthy, 95 Educ. L. Rep. at 823-24 (cited in this note) (discussing the concept of "inclusion" of children with disabilities in public school classrooms).

193. See 20 U.S.C. § 1412(5)(B) (stating that removal from the regular classroom should occur "only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids cannot be achieved satisfactorily").

194. 120 Cong. Rec. 15272 (May 20, 1974) (remarks of Senator Stafford).

195. McCarthy, 95 Educ. L. Rep. at 824 (cited in note 192) (citing Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 Law and Contemp. Problems 157, 157-81 (1985)).

196. 700 F.2d 1058 (6th Cir. 1986).

197. Goldman, 20 U. Dayton L. Rev. at 267 (cited in note 36).

198. *Roncker*, 700 F.2d at 1060. To qualify as "trainably mentally retarded," a student must score below 50 on a standardized I.Q. test. *Id.*

199. *Id.*

bly be provided in a less restrictive setting.<sup>200</sup> The court indicated a "strong preference in favor of mainstreaming"<sup>201</sup> yet also recognized the inevitable truth that some children with mental impairments require separate facilities.<sup>202</sup> The *Roncker* court listed several considerations to be analyzed in a mainstreaming case, including whether the child would benefit from the mainstream setting, whether the child would represent a "disruptive force" presenting a great burden on the teacher and other students, and the cost of the more restrictive placement.<sup>203</sup>

The first of these considerations focuses on the potential benefit a child with disabilities would receive, mirroring the concerns in the "appropriate education" and "related service" problems previously discussed. In *Daniel R.R. v. State Board of Education*,<sup>204</sup> the Fifth Circuit broadened this component of the *Roncker* test,<sup>205</sup> stating that although the child may not understand much of the academic discussion in a regular classroom, he or she "may benefit from nonacademic experiences in the regular education environment."<sup>206</sup> The benefits of mainstreaming are, however, dependent upon a school district's

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200. *Id.* at 1063.

201. *Id.*

202. *Id.*

203. *Id.* The Fourth and Eighth Circuits have also adopted this test. See *Devries by DeBlaay v. Fairfax County School Bd.*, 882 F.2d 876, 878-79 (4th Cir. 1989) (quoting the *Roncker* decision); *A.W. by and through N.W. v. Northwest R-1 School Dist.*, 813 F.2d 158, 163 (8th Cir. 1987) (stating that the *Roncker* decision "correctly interpreted the Act's mainstreaming provisions").

204. 874 F.2d 1036 (5th Cir. 1989).

205. Under the *Daniel R.R.* test, a court must first determine "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily . . . [and, if not] whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* at 1048.

The Fifth Circuit stated that, in determining whether the first prong of the test has been met, courts should consider (1) what steps the school has taken to accommodate the child in the regular classroom, (2) whether the child will receive an educational benefit from regular education, (3) the child's overall educational experience in a regular education environment, and (4) the effect on the regular classroom of the disabled child's presence. *Id.* at 1048-49. The Third and Eleventh Circuits have also adopted this test. See *Oberti*, 995 F.2d at 1215 (stating that the *Daniel R.R.* test is preferable to the *Roncker* test and adopting the *Daniel R.R.* test); *Greer By and Through Greer v. Rome City School Dist.*, 950 F.2d 688, 696 (11th Cir. 1991), opinion withdrawn and remanded, 956 F.2d 1025, 1027 (11th Cir. 1992), opinion reinstated in part and amended, 967 F.2d 470, 471 (11th Cir. 1992) (explicitly adopting the Fifth Circuit's test).

206. *Daniel R.R.*, 874 F.2d at 1048. The court explained that "mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. . . . Although a handicapped child may not be able to absorb all of the regular classroom curriculum, he may benefit from nonacademic experiences in the regular education environment." *Id.* at 1047-48. But see *Devries*, 882 F.2d at 879 (upholding the district court's finding that the child's disability would make it too difficult to bridge disparity in cognitive ability with nonhandicapped children).

supplying the child with the requisite support services.<sup>207</sup> If the school fails to provide such services, the child's benefits will consist only of mere presence in the regular class. Thus, the Fifth Circuit held that courts should conduct a searching inquiry into the existence and sufficiency of supplemental aids and services before analyzing whether the state has complied with the IDEA. As the *Daniel R.R.* court stated, "[t]he Act does not permit states to make mere token gestures to accommodate handicapped students; its requirement for modifying and supplementing regular education is broad."<sup>208</sup>

If school districts are inadequate in supplying supplemental services,<sup>209</sup> mainstreaming will inevitably fail to accomplish its intended purpose of providing disabled students the unique aid they require in a regular class setting. By focusing excessively on cost,<sup>210</sup> courts are "provid[ing] a foothold for those who would deny services and opportunities to disabled individuals, while hiding behind the cause of fiscal responsibility."<sup>211</sup> Because many children with disabilities may never be fully incorporated into an atmosphere similar to that of regular society, their chances of ever reaching a state of independence and self-sufficiency will be severely limited by this stunted application of the IDEA.

#### IV. DISCIPLINE AND THE IDEA

Another consideration in the *Roncker* test is the potential for some handicapped children to exhibit "disruptive force." The concern is that a child's behavior might impose too great a burden on the classroom teacher and the nonhandicapped students.<sup>212</sup> This discipline issue is rapidly becoming the most contested of all IDEA-related

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207. See 34 C.F.R. § 300.1 (stating that the purpose of the IDEA is "[t]o insure that all children with disabilities have available to them a free appropriate public education that includes special education and *related services* to meet their unique needs") (emphasis added). Senator Stafford has also made this observation. See note 131 and accompanying text.

208. *Daniel R.R.*, 874 F.2d at 1048.

209. See note 46 and accompanying text.

210. The Ninth Circuit provided the third major "mainstreaming" test in *Rachel H.*, 14 F.3d at 1398, which also included a cost provision. The test is a four-factor test balancing "(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such a placement; (3) the effect [the child] ha[s] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the child]." *Id.* at 1404.

211. Donohue, 8 J. Contemp. Health L. & Pol. at 427 (cited in note 160). See also note 162.

212. *Roncker*, 700 F.2d at 1063. See also *Rachel H.*, 14 F.3d at 1404 (citing as a factor in considering mainstreaming the effect a child with disabilities will have on the regular class); *Daniel R.R.*, 874 F.2d at 1049.



controversies.<sup>213</sup> In fact, some commentators have questioned whether children with disabilities who present discipline problems should even be included in the educational process at all.<sup>214</sup>

The substantive and procedural rights the IDEA provides to eligible students seek to protect children with disabilities from constructive exclusion from public schools and to prevent excessive long-term expulsions and suspensions.<sup>215</sup> One of the most controversial of these rights is the "stay-put" provision.<sup>216</sup> Essentially, this provision requires that a child remain in his or her present placement while administrative and court proceedings regarding placement are underway.<sup>217</sup> If the child is seeking admission into the public school system, the stay-put provision requires that the child be placed in a public school until the proceedings end.<sup>218</sup>

The Supreme Court's interpretation of this provision in *Honig v. Doe*,<sup>219</sup> has caused much of the controversy. In *Honig*, the Court considered whether an implied "dangerousness" exception existed that exempted violent children from the protection of the stay-put clause.<sup>220</sup> The Court recognized that the intent behind the provision was to protect students with disabilities, particularly those with emotional disturbances, against exclusionary practices.<sup>221</sup> In essence, the Court found that the provision served "to strip schools of the unilateral authority" they once had to exclude students with disabilities. The Court thus refused to exempt violent children from the stay-put clause.<sup>222</sup>

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213. Telephone Conversation with Dave Larson, IDEA Adviser to Senator Bill Frist (Jan. 10, 1997) (stating that for seriously emotionally disturbed students, discipline is the "hot-button" issue).

214. Steven R. Aleman and Nancy Lee Jones, Education and Public Welfare Division of the Congressional Research Service, *Overview of Discipline Procedures for Children with Disabilities Contained in S. 1578, as Reported by Senate Labor and Human Resource Committee 3* (Apr. 16, 1996) (on file with the Author) (suggesting that if a child is found to be involved with drugs or weapons and if a child's behavior is determined not to have been a manifestation of his or her disability, then a school district should be permitted to remove that child from the educational process completely, denying him FAPE benefits).

215. Ordovery and Boundy, *Educational Rights* at 81 (cited in note 50).

216. 20 U.S.C. § 1415(e)(3)(A).

217. "By preserving the status quo ante, the stay-put provision ensures an uninterrupted continuity of education for a disabled child pending administrative resolution." *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 115 S. Ct. 2557, 132 L. Ed. 2d 811 (1995).

218. 20 U.S.C. § 1415(e)(3)(A).

219. 484 U.S. 305 (1988).

220. *Id.* at 308.

221. *Id.* at 324.

222. *Id.* at 323.

Although many courts have chosen to focus on the Court's refusal to recognize a "dangerousness" exception, the *Honig* Court actually went to great lengths to provide school districts with tools to use when dealing with a truly disruptive student. First, the Court's decision allowed a school to overcome the stay-put provision either by obtaining the parents' permission or a court injunction.<sup>223</sup> Second, the *Honig* Court recognized that a school district may employ alternative methods to discipline disruptive children, including the use of "study carrels, time-outs, detention, or the restriction of privileges."<sup>224</sup> Finally, the Court authorized a ten-day suspension when "a student poses an immediate threat to the safety of others."<sup>225</sup>

Despite the limits placed on the provision in *Honig*, it remains the source of substantial controversy.<sup>226</sup> Prompted by increased school

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223. *Id.* at 326, 328. The Supreme Court specified that to receive an injunction, a school district must show the child's placement is "substantially likely to result in injury either to himself, or herself, or to others." *Id.* at 328.

224. *Id.* at 325.

225. *Id.* (quoting Comment following 34 C.F.R. § 300.513). One commentator has suggested that "[a]ny exclusion from school of more than ten days constitutes a change of placement for purposes of IDEA, may be accomplished only through the change of placement procedures set forth in the statute and implementing regulations, and triggers all procedural rights set forth in 20 U.S.C. § 415." Eileen L. Ordovery, *Disciplinary Exclusion of Students with Disabilities under Federal Law: An Overview 7* (Center for Law and Education, 1995).

226. See generally Omyra M. Ramsingh, Comment, *Disciplining Children with Disabilities Under the Individuals with Disabilities Education Act*, 12 *J. Contemp. Health L. & Pol.* 155, 181 (1995) (discussing the need for revision of the stay-put provision). In response to proposed amendments to the IDEA, there has been a great deal of testimony before Congress on the issue. Kathleen B. Boundy stated the following about the harsh public reaction to the stay-put provision:

Contrary to all rhetoric, existing law permits school authorities to remove any child, including those with disabilities, from his/her current educational placement if he/she is dangerous to self or others. There have been fewer than a half dozen reported decisions over a period of 7 years since the *Honig* decision in which school districts have actually gone into a court of competent jurisdiction to enjoin a child with disabilities from attending school because the youngster is allegedly dangerous to self/others. The truth of the matter is that these court ordered injunctions are infrequently sought because *rare is the case where a school district is able to demonstrate that a student is dangerous to himself, herself or others that a parent will disagree, file a complaint and invoke the student's "stay-put" rights.* Parents of children with disabilities are no different than other parents—they do not want their children, who may be even more vulnerable, being left in a situation where they . . . [are] a danger to themselves or others. In my experience the schools have prevailed in the very few instances when parents refused to concur in a school's proposal to remove a child, who is alleged to be dangerous to self or others, from his/her current education[al] placement for a period in excess of ten school days, and where there is a predicate for a finding of dangerousness.

Reauthorization of the IDEA: Discipline Issues, Hearing Before the Subcommittee on Labor and Human Resources, 104th Cong., 1st Sess. 100 (1995) (statement of Kathleen B. Boundy, Center for Law and Education) ("Boundy Testimony"). Sadly, "students with disabilities are

violence, lawmakers have acted to impose further limits on application of the stay-put provision.<sup>227</sup> For example, under the Improving America's Schools Act of 1994,<sup>228</sup> a disabled child's IEP team may place him or her in an interim alternative educational placement for up to forty-five days, with or without parental permission, if the child brings a firearm to school and the child's conduct is determined to be unrelated to his or her disability.<sup>229</sup> Other proposals go even further. Senator Bill Frist of Tennessee recently recommended that a disabled child found with drugs or weapons be permanently denied FAPE in any form or fashion when the child's behavior is not a manifestation of his or her disability.<sup>230</sup>

Given the procedural safeguards set forth in *Honig*, such proposals and amendments are unnecessary and superfluous. In addition, a central problem of both the proposed amendment and the firearm ban is the difficulty of determining whether a particular behavior is related to a disability. A severe emotional disturbance or mental retardation quite possibly manifests itself in all behaviors.<sup>231</sup>

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more likely to be the victims of violence and disruption than its perpetrators." Ramsingh, 12 J. Contemp. Health L. & Pol. at 181 (cited in this note).

227. One commentator has noted that "as many as fifty young people lose their lives each year in school related violence." Mansfield, 1 N.Y. City L. Rev. at 203 (cited in note 6) (citing Charles J. Russo, *United States v. Lopez and the Demise of the Gun-Free School Zones Act: Legislative Over-Reaching or Judicial Nit-Picking?*, 99 Educ. L. Rep. (West) 11, 11 (1995) (citing 140 Cong. Rec. S6586 (daily ed. June 8, 1994) (remarks of Sen. Feinstein)). In addition, 11% of American public school teachers and 23% of American public school students report that they have been victims of violence in or near their schools. *Id.* at 204 (citing R. Craig Wood and Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses*, 97 Educ. L. Rep. (West) 619, 619 (1995) (citing Louis Harris and Associates, Inc., *The Metropolitan Life Survey of the American Teacher, 1993* at 7 (Metropolitan Life Insurance Company, 1993)).

228. Pub. L. 103-382, 108 Stat. 3518, 3518-4032 (1994), codified in scattered sections of 20 U.S.C.

229. Pub. L. 103-382, § 314, 108 Stat. 3518, 3936-37 (1994), codified at 20 U.S.C. § 1415(e)(3) and 20 U.S.C. § 8621 (1994 ed.); Improving America's Schools Act of 1994, H.R. Conf. Rep. No. 103-761, 103d Cong., 2d Sess. 883, reprinted in 1994 U.S.C.C.A.N. 2901, 3214; 140 Cong. Rec. S10017 (daily ed. July 28, 1994) (listing U.S. Department of Education Guidance Concerning State and Local Responsibilities under the Gun-Free Schools Zone Act of 1994).

230. See S. 1578, 104th Cong., 2d Sess. § 615A(b)(2)(B) (stating that a child with a disability who engages in behavior that violates rules of the local educational agency "shall continue to receive educational services, consistent with provision of free appropriate public education, unless . . . the behavior was not a manifestation of the disability").

231. See *Ordover, Disciplinary Exclusion* at 2 n.7 (cited in note 225) (citing *S-1 v. Turlington*, 635 F.2d 342, 346-47 (5th Cir. 1981), disapproved by *Honig v. Doe*, 484 U.S. 305, 317 (1988), and citing *School Bd. of Prince William County, Virginia v. Malone*, 762 F.2d 1210, 1216 (4th Cir. 1985)). In *Turlington*, the Fifth Circuit stated that knowledge of the difference between right and wrong does not establish that misconduct is or is not a manifestation of a handicap. *S-1 v. Turlington*, 635 F.2d 342, 346 (5th Cir. 1981), disapproved by *Honig v. Doe*, 484 U.S. 305, 317 (1988). For example, "a child with low intellectual functioning . . . [might] respond to stress or respond to a threat in the only way that they feel adequate," which may be "verbal aggressive behavior." *Id.* at 346-47. Also, an "orthopedically disabled child might behave aggressively towards other children, provoking fights, as a way of dealing with stress and

Any argument that violent behavior is unrelated to a disability would be questionable at best.

The new provisions and Senator Frist's proposal also present other serious problems. First, requiring a nexus between a disability and violent behavior to receive the benefits of the stay-put provision undermines the explicit non-exclusion mandates underlying the passage of the IDEA.<sup>232</sup> Second, the nexus requirement will disparately affect children from lower-income families, already unable to obtain the independent evaluations, expensive psychiatric testing, and expert witness fees required to succeed in challenging findings by school districts.<sup>233</sup>

Finally, such provisions and proposals are shortsighted because children with mental impairments have significantly lower rates of school completion, graduation, continuing education, and employment, and a significantly higher rate of involvement with the juvenile and adult correctional systems.<sup>234</sup> An inability to control one's own behavior is a roadblock to the goal of self-sufficiency. As the Sixth Circuit recently stated, "[w]hen school systems fail to accommodate a disabled student[s] behavioral problems, these problems may be attributed to the school system's failure to comply with the re-

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feelings of physical vulnerability." *Id.* In *Malone*, the Fourth Circuit found that students with specific learning disabilities acted as a go-betweens in drug deals for fellow students. *School Bd. of Prince William County, Virginia v. Malone*, 762 F.2d 1210, 1216 (4th Cir. 1996). The court concluded that the district court had properly reasoned that "[a] direct result of . . . [the student's] learning disability is a loss of self image, an awareness of lack of peer approval occasioned by ridicule or teasing from his chronological age group . . . . These emotional disturbances make him particularly susceptible to peer pressure. Under these circumstances he leaps at a chance for peer approval." *Id.* at 1216.

232. Boundy Testimony at 102 (cited in note 226).

233. *Id.*

234. *Id.* Ms. Boundy provided the following statistics:

[Fifty percent] . . . of students identified as seriously emotionally disturbed drop out of school before they graduate, and 20% are arrested at least once before leaving school, 35% within a few years of leaving school. Generally, about 38% of all students with disabilities drop out of school before graduation, and dropped out with fewer than 10 credits. Students with disabilities from low-income families and from minority groups are at greater risk of dropping out of school, and in addition to students with serious emotional disturbances, students with mental retardation, learning disabilities, other health impairments, or speech impairments drop out in significant numbers (23-30%). Students with disabilities compared to students without disabilities have a significantly greater likelihood of being on welfare . . . [and of] having difficulty finding and maintaining a job.

*Id.* (footnotes omitted) (citing Office of Special Education Programs, U.S. Department of Education, *To Assure the Free Appropriate Public Education of All Children with Disabilities: Sixteenth Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act 97-99*, 109-10 (U.S. G.P.O., 1994)).

quirements of the IDEA."<sup>235</sup> The Sixth Circuit's statement is consistent with the IDEA provision that handicapped children should be removed from a regular classroom only when education cannot be satisfactorily achieved in that classroom even with the use of supplementary aids and services.<sup>236</sup> Under the IDEA, a child with disabilities is entitled to a "free appropriate public education which emphasizes special education and related services designed to meet their unique needs."<sup>237</sup> Any inability to control behavior that affects a child's ability to gain meaningful benefit from education should be viewed as a unique need addressed in his or her IEP.<sup>238</sup> A failure to do so should result in nothing short of a direct violation of IDEA requirements.<sup>239</sup>

When considering proposals such as Senator Frist's, Congress should examine exactly what is being accomplished by excluding children with mental impairments and problems from schools. Certainly, such proposals do not further school safety any more than does the availability of court injunctions and short-term suspensions. Nor will they deter future violent behavior because children with disabilities will probably not understand the causal relationship between their behavior and the consequences. Such proposals do nothing more than undermine the IDEA's intent by decreasing self-sufficiency and encouraging dependence. These results would increase the chance that children with disabilities would end up either on welfare or in prison.<sup>240</sup> Needless to say, neither of these results is the end product of a successful education system.

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235. *Morgan v. Chris L.*, No. 94-6561, 1997 U.S. App. LEXIS 1041, at \*14-15 (6th Cir. Jan. 21, 1997) (citing *Kaelin v. Grubbs*, 682 F.2d 595 (6th Cir. 1982)). The *Kaelin* opinion recognized the connection between an inappropriate IEP and a student's disciplinary difficulties. *Kaelin v. Grubbs*, 682 F.2d 595, 601 (6th Cir. 1982).

236. 20 U.S.C. § 1412(5)(B).

237. *Id.* § 1400(c).

238. See *Howard S. v. Friendswood Indep. School Dist.*, 454 F. Supp. 634, 640 (S.D. Tex. 1978) (finding that the plaintiff, whom school officials sought to expel following a suicide attempt and hospitalization, "was not afforded a free, appropriate public education during the period from the time he enrolled in high school until December of 1976, [which] was . . . a contributing and proximate cause of his emotional difficulties and emotional disturbance").

239. See *Chris D. v. Montgomery County Bd. of Educ.*, 753 F. Supp. 922, 932-33 (M.D. Ala. 1990) (holding that the school failed to provide appropriate educational program to an emotionally disturbed student; rather than employing strategies to teach the student appropriate behavior with the goal of ultimately returning him to the regular education setting, the IEP merely described classroom rules and punishments and rewards for breaking or following them).

240. See note 234.

## V. CONCLUSION

This Note has analyzed the benefit the IDEA guarantees a wide range of children, from those suffering from mental retardation to those with severe emotional disturbances. Some children falling within IDEA guidelines even have additional problems such as drug addiction and an inability to control their behavior. In passing the IDEA, Congress was attempting to provide benefits to every child suffering from a disability. It "believed that money spent on educating children with disabilities to be self-sufficient adult members of society would be more humane, and less expensive to society than maintaining such persons as welfare dependents or in institutions."<sup>241</sup> Each child requires unique care to reach a state of self-sufficiency. Unfortunately, society has demonstrated a general lack of commitment to provide funding and services necessary to address these unique needs.<sup>242</sup> The focus of our concern and resources must shift toward providing children with mental impairments the skills they need to reach a state of independence. This attention would benefit

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241. Melvin, 44 DePaul L. Rev. at 618 (cited in note 36). See also John Harrison, *Self-Sufficiency Under the Education for All Handicapped Children Act: A Suggested Judicial Approach*, 1981 Duke L. J. 516, 521-28 (emphasizing Congress's perception that children with disabilities should receive that level of educational opportunity reasonably necessary to achieve a maximum level of self-sufficiency so as not to become a burden to society or the child's family, and to avoid the indignity of institutionization).

242. See Goldman, 20 U. Dayton L. Rev. at 244 n.11 (cited in note 36) ("Congress authorized the federal share of costs for special education services to increase to a cap of 40% by 1981, but appropriations have never exceeded 12% of the excess costs associated with special services.") (citing Martha M. McCarthy, *Can Costs Be Considered in Special Education Placements?*, 22 J. L. & Educ. 265, 266 (1993)). As of 1984-85, the federal government was paying 8.2% of the cost of special education funding, while states paid 56.7% and local districts paid the remaining 35.1%. Samuel Dempsey and Douglas Fuchs, *"Flat" Versus "Weighted" Reimbursement Formulas: A Longitudinal Analysis of Statewide Special Education Funding Practices*, 59 Exceptional Children 433, 433 (1993).

not only the children themselves, but also society as a whole. Let us truly unite in the education of our children and work together in preparing this nation for its future.

*Robert Caperton Hannon\**

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\* This Note is dedicated to Sandra C. Dobson, who currently teaches Language Arts and manages the Gifted and Talented Program at Barnard Elementary School in Washington, D.C. By witnessing her preparation, patience, and persistence, I came to understand that *all* children are blessed with the power to learn. It is the school, the teacher, and the community that must find a way to make that power an active, thriving force in a child's life. These are the beliefs with which Sandy attacks every day and in every lesson. God bless her and her dedication.

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